UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCARE, INC. Employer	)	
and	)	Case 7-RC-22141
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO Petitioner	)	
BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER Employer	)	
and	)	Cases 18-RC-16415, 18-RC-16416
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC Petitioner	)	
CROFT METALS, INC. Employer	)	
and	)	Case 15-RC-8393
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO Petitioner	)	

BRIEF OF AMICUS CURIAE SALT LAKE REGIONAL MEDICAL CENTER, INC.

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COMES NOW Amicus Curiae Salt Lake Regional Medical Center, Inc. ("SLRMC") and respectfully submits its Brief pursuant to the National Labor Relations Board's July 25, 2003 Notice and Invitation to File Briefs in the above-referenced cases. SLRMC is an acute care hospital in a case currently pending before the Board (Case No. 27-RC-8157) regarding the supervisory status of its charge nurses under § 2(11) of the National Labor Relations Act.

This brief addresses only Issue No. 1 identified by the Board in its Notice:

> What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act? In particular, what is "the degree of discretion required for supervisory status," i.e., "what scope of discretion qualifies" (emphasis in original)? Kentucky River at 713. What definition, test, or factors should the Board consider in applying the term "independent judgment"?

As detailed more fully herein, SLRMC proposes that the Board adopt a special industry-specific test for determining whether a charge nurse or other health care professional exercises "independent judgment" within the meaning of the NLRA.

I. THE BOARD SHOULD CARVE OUT A SPECIAL TEST FOR DETERMINING WHETHER A HEALTH CARE WORKER IS EXERCISING INDEPENDENT JUDGMENT UNDER THE ACT

Because supervisors are not entitled to the rights to organize and to engage in collective bargaining free from employer interference, the statutory definition of "supervisor" is essential in determining which employees are covered by the Act. NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 571, 572-73 (1994). Section 2(11) of the Act defines a supervisor as any individual having authority, in the interest of the employer, to assign or responsibly direct other employees (among other things), if the exercise of such authority is not merely routine or clerical in nature but requires the use of independent judgment. 29 U.S.C. § 152(11).

Based on its analysis of relevant precedent, the unique nature of the health care

industry and the facts of the cases in the Notice, SLRMC proposes that the Board should adopt a special test for determining whether a health care professional exercises independent judgment for purposes of the NLRA's supervisory exception. Under this test, if the party asserting supervisory status produces evidence that (1) the putative supervisor is directly involved in patient care *and* (2) the putative supervisor has the power to direct or assign other employees in their delivery of patient care services based on his or her judgment as to the skill of the employee, the patient's acuity or other variables, that party should be entitled to a rebuttable presumption that the individual(s) in question is/are exercising independent judgment within the definition of the Act, notwithstanding the fact that the employee(s) may be guided largely by rules, policies and regulations in carrying out their authority.[1]

There is ample precedent for carving out special treatment for such health care workers: Congress and the Board recognize that health care is a special industry that they have treated differently in the past and burden-shifting frameworks, similarly, are not alien concepts in Board jurisprudence.

A. Health Care Is a Unique Industry

Health care institutions are engaged in a unique industry. Congress recognized this precise fact when it extended the NLRA to health care institutions in 1974.[2] See S. Rep. No.

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[1] Requiring the party asserting the applicability of the supervisory exception to meet the initial burden of proof satisfies the Supreme Court's holding regarding this issue in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711-12 (2001).

[2] The Board recognizes that prior to the 1974 health care amendments to the Act, "charge nurses were found supervisory" where the facts demonstrated that "they utilized their professional judgment in assigning and directing other employees." Beverly Enters.-Ohio, 313 N.L.R.B. 491, 509 n. 12 (1993) (citing Avon Convalescent Ctr., 200 N.L.R.B. 702, 705 (1972); Rockville Nursing Ctr., 193 N.L.R.B. 959, 962 (1971)). "Those amendments did not alter the test for supervisory status in the health care field." Health Care, 511 U.S. at 581-82.

93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 3946, 3951 ("Many of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care institutions."). Both the Board and courts have noted that patient care and their concomitant welfare is the object, concern and business of the health care industry. Health Care, 511 U.S. at 580; Beverly Enters.-Ohio, 313 N.L.R.B. at 494.

Since the health care industry deals with ill human beings, the types of decisions that are made in hospitals and nursing homes are fundamentally different than those that are made at a construction site or factory. See Mercy Hosp., Case 18-RC-16861, dec. at 28 (Nov. 13, 2001) (Sharp, R.D.) (noting that "deciding which nurse should best be able to handle a troublesome patient is far different from deciding who is qualified to operate a lathe or a forklift"). In the health care industry, a wrong decision can result in malpractice liability, personal injury or even death. As a result, there can be no dispute that health care is unique.[3]

B. The Board and Congress Have Created Special Exceptions Applicable Only to Health Care Employers in the Past Based on the Unique Nature of the Industry

SLRMC's suggestion that the Board create a special rule for putative supervisors in the health care industry is not a radical proposal. Based on the unique nature of the health care industry and the importance of patient care, the Board and Congress have created special exceptions applicable to the health care industry. For instance, while there is a "usual presumption that rules against solicitation on nonwork time are invalid," the Board has

[3] The policy issues that support a categorical test for supervisory status in health care are industry-specific. SLRMC's proposed solution thus would exclude employees not involved in patient care like those in Croft Metals, Inc., Case No. 15-RC-8393, supp. dec. at 5 (Aug. 7, 2002) (Johnson, R.D.), who manufactured aluminum and vinyl doors and windows. The Board should apply its historical approach to supervisory status for such employees.

modified that general rule regarding the validity of employer regulations of solicitation in health care institutions. NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 778 (1979). In hospitals or other health care facilities, "the Board has indicated that it will not regard as presumptively invalid proscriptions on solicitation in immediate patient care areas." Id.

Similarly, the Board generally makes bargaining unit determinations by adjudication using a number of tests including bargaining history in the industry; similarity of duties, skills, interests and working conditions of the employees; organizational structure of the company; and desires of the employees. 1 Patrick Hardin et al., The Developing Labor Law 590 (4th ed. 2001). In recognition of the unique nature of the health care industry, however, "[f]or the first [and only] time since the National Labor Relations Board was established in 1935, the Board has promulgated a substantive rule defining the employee units appropriate for collective bargaining in a particular line of commerce." American Hosp. Ass'n v. NLRB, 499 U.S. 606, 608 (1991). See 29 C.F.R. § 103.30 (setting forth the regulations defining the presumptively appropriate bargaining units for acute care hospitals). The Board therefore recognizes the distinctions between health care and other industries.

A third recognized difference regarding the health care industry concerns labor disputes. When Congress amended the Act in 1974 to cover health care employees, it lengthened the Section 8(d) notice periods and added Section 8(g) in order to give health care institutions sufficient advance notice of possible labor disputes to permit timely arrangements for continuity of patient care so as to prevent any disruption in health care services. See 29 U.S.C. § 158(d)(A)-(C), 29 U.S.C. § 158(g). These special procedures only apply when the collective bargaining involves employees of a "health care institution." Because these special procedures are part of the statute itself, they are the best example of how the health

care industry is to be accorded special treatment in dealing with patient care issues.

The Board recently revisited the rationale behind Section 8(g) in Alexandria Clinic, P.A., 339 N.L.R.B. No. 162, slip op. at 5 (Aug. 21, 2003):

> Congress chose to threat the health care industry uniquely because of its importance to human life, cognizant of the possibility that disruption in patient care of even a few hours may cost lives. Consequently, determining the lawfulness of any work stoppage without adequate notice to a health care institution must take into account the high public interest in uninterrupted health services.

The reasoning behind these three industry-specific exceptions to the general rules of labor-management relations applies equally with regard to the issue of supervisory status.

C. The Board Has Utilized Burden-Shifting Frameworks in the Past

SLRMC's proposed resolution to the problem presented by Question No. 1 of the Notice is reasonable for another reason. That is, the Board has utilized burden-shifting in the past to facilitate the determination of questions before it.

For instance, the Act states that the Board must find an unfair labor practice by a preponderance of the evidence. 29 U.S.C. § 160(c). Despite this explicit statutory language, in Wright Line, 251 N.L.R.B. 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), the Board created a burden-shifting framework for proving causality in unfair labor practice cases. The Board held that in order to prove a violation of the anti-discrimination provisions of the NLRA, the General Counsel need only make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Id. at 1089. "Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id.

Under Wright Line, even though the burden of proof is initially on the Board to prove

a violation of the Act, it is the employer who is responsible for introducing enough evidence to persuade the Board that it would have taken the challenged personnel action regardless of the employee's protected activity and the employer's union animus. As a result, SLRMC's proposed burden-shifting framework is not a foreign concept to Board jurisprudence.

D. Neither Employer Policies, Procedures and Regulations Nor Collective Bargaining Agreement Requirements Should Negate the Existence of Independent Judgment

While "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer," Kentucky River, 532 U.S. at 713-14, the Supreme Court and lower courts will defer to the Board's new test for independent judgment that will lower the weight given to the presence of operating rules and procedures, and that without more, will not negate the existence of independent judgment. Now, in far too many health care cases, the Regional Directors ("RDs") place an undue amount of weight on the hospital or nursing home's policies and procedures in finding that charge nurses do not exercise independent judgment.

All the record in these health care cases (including decisions in Oakwood Healthcare, Inc. and Beverly Enters.-Minn., Inc. that are the subject of the Notice) reflects is the *existence* of policies and procedures. In finding that the employer's policies eliminated the charge nurses' exercise of independent judgment, the RDs ignored the bedrock legal principle that "the existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive." NLRB v. Qunnipiac College, 256 F.3d 68, 75 (2d Cir. 2001). See also Evergreen New Hope Health & Rehabilitation Ctr. v. NLRB, 65 Fed. Appx. 624, 625 (9th Cir. 2003) (rejecting the Board's argument "that the lengthy

manuals provided at each nursing station so constrain the discretion of the charge nurses' decision-making that they cannot be said to be exercising independent judgment").

This is especially true in the health care industry. "Quite obviously many scheduling decisions made routinely by the [charge nurses] . . . must require independent judgment. The [RD] mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think. In the [RD]'s view, [charge nurses] just mechanically follow established procedure." Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333, 341 (4th Cir. 1998).

Such a decision ignores the unique nature of the services provided to patients in a hospital or nursing home. As noted earlier, patient care is the object, concern and business of the health care industry. Furthermore, the Board and courts have recognized that when disastrous consequences could result from the mishandling of employee oversight responsibilities, such responsibilities cannot simply be swept aside as routine or clerical. Sun Ref. & Mktg. Co., 301 N.L.R.B. 642, 649 (1991). See also Spontenbush/Red Star Cos. v. NLRB, 106 F.3d 484, 491 (2d Cir. 1997); NLRB v. McCullough Envtl. Servs., 5 F.3d 923, 941-42 (5th Cir. 1993); Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347, 356-57 (1st Cir. 1980).

As a result, the decision "to assign nurses to patients based on analysis of nurses' skills and patients' needs" is a "momentous decision[ ] for the patients that no formula can reproduce." Mercy Hosp., dec. at 28. Indeed, as noted earlier, "deciding which nurse should best be able to handle a troublesome patient is far different from deciding who is qualified to operate a lathe or a forklift." Id. See also Hospice of Mich., Case 7-RC-22100, dec. at 8 (Nov. 21, 2001) (Schaub, R.D.) ("That RNs [registered nurses] must administer medication

according to a physician's standing orders and are guided in treating certain patient conditions by protocols does not detract from the independent judgment the RNs exercise in translating those orders and policy into specific plans of care.").

Given the unique circumstances of the health care industry, the Fourth Circuit's analysis in Glenmark is especially apropos here. "Although there is a general procedure in place regarding whom to call should an absence occur, on some occasions the [charge nurses] exercise their independent judgment and decide to operate the nursing home or their floor shorthanded." 147 F.3d at 341-42. Similarly, "the decisions of whether to call in additional staff and whether to reorganize the schedule to accommodate patient emergencies require the exercise of independent judgment." Id. at 343. This is true even where, as in Glenmark, Beverly and Oakwood, "the order in which the individuals were to be called in was governed by the CNAs' [certified nursing assistants] collective bargaining agreement and the CNAs had regular hall assignments" and where "permanent staffing levels are determined by the facility administrator and the Director of Nursing." Id.

Reference to the analogous provisions of the Fair Labor Standards Act provides guidance in this regard.[4] In Donovan v. Burger King Corp., 675 F.2d 516 (2d Cir. 1982), just as in Beverly, the court was faced with the situation where the Secretary of Labor did not dispute the employer's fast food restaurant assistant managers' powers and responsibilities; rather, the government argued that these powers were so constrained by the company's

[4] Courts have noted in the past that the exemptions under the NLRA and FLSA are analogous. Thus, in Dalheim v. KDFW-TV, 918 F.2d 1220, 1232 (5th Cir. 1990), the Board's prior conclusion that "neither producers nor directors nor assignment editors are supervisors within § 2(11) of the National Labor Relations Act" supported the court's finding that "[p]roducers, therefore, do not manage, and are not exempt executives" under the FLSA.

detailed instructions that they did not exercise discretionary powers so as to be exempt from overtime pay under the FLSA. The court rejected such arguments: "The exercise of discretion, however, even where circumscribed by prior instruction, is as critical to [ ] success as adherence to the book." Id. at 521-22. Just as in Beverly, the employer "seeks to limit likely mistakes by issuing detailed guidelines, but judgments must still be made." Id. at 522. Where a patient's health and life may be affected by a charge nurse's decisions, an employer should not be penalized for trying to limit mistakes through policies or procedures.

In Minnesota (where Beverly is located) and Michigan (where Oakwood is located), hospital policies or procedures may be evidence of accepted medical practice and therefore relevant in a medical malpractice case. See generally Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn. 1977); Kakligan v. Henry Ford Hosp., 210 N.W.2d 463 (Mich. Ct. App. 1973). Indeed, in Kay v. Fairview Riverside Hosp., 531 N.W.2d 517, 520-21 (Minn. Ct. App. 1995), a plaintiff sued a Minnesota hospital alleging that its unrestricted visitation policy constituted neglect under the Vulnerable Adult Act. "Appellant contends that this likelihood of crime required that Riverside implement a more restrictive visitation policy." Id. at 520. Yet under the RDs' logic in Beverly and Oakwood, a health care employer faces the Hobson's choice of either promulgating restrictive policies to limit malpractice lawsuits (which would render most if not all persons involved in patient care non-supervisory) or issuing no policies at all so as to preserve the supervisory status of its charge nurses (thereby opening itself up to lawsuits for not properly overseeing its employees). This cannot be the case.

At least in the health care context, the fact that there are policies, procedures or even a collective bargaining agreement addressing staffing, scheduling or assignments should not, without more, negate a finding of independent judgment. Only where the evidence shows

that the charge nurse has virtually no authority to change workloads, assignments, scheduling or staffing should the result be different.

E. In Order to Maintain Patient Care, Health Care Employers Must Be Able to Count on the Loyalty of Employees Exercising Supervisory Oversight

When Congress enacted the health care amendments to the NLRA, it noted that "there is one overriding principle which cannot be compromised: the paramount public interest in having access, unimpeded and unhindered, to the best possible health care." S. Rep. No. 766, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. at 3953. Any decision that the Board makes that affects the status of charge nurses or other employees exercising supervisory authority in the health care industry must be guided by this one overriding principle.

Despite this paramount public interest, in recent health care cases (including Oakwood and Beverly, the subject of the Notice) the Board has interpreted and applied the definition of "independent judgment" in such a manner as to deny nurses § 2(11) supervisor status almost as a matter of course. By preventing the employer from counting on the loyalty of its nurse supervisors, these decisions will adversely impact the ability of health care providers to effectively deliver quality care to patients.

"The structure of § 152 ensures that employers may rely on supervisors to exercise their independent judgment without the threat of accountability to the employees whom they supervise." NLRB v. Winnebago Television Corp., 75 F.3d 1208, 1213, 1217 (7th Cir. 1996). The legislative history of the Act reinforces this conclusion. "It is impossible to manage a plant unless the foremen are wholly loyal to the management." 93 Cong. Rec. 3952 (daily ed. April 23, 1947) (statement of Sen. Taft). See also H.R. Rep. No. 245, 80th Cong., 1st Sess. 14 (1947) (noting that employers, "as well as workers, are entitled to loyal representatives in the plants, but when the foreman unionize . . . they are subject to influence

and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them"). Accordingly, Congress concluded that "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust." Id. at 17. This reveals the plain Congressional intent that management be assured the complete loyalty of its front line supervisory staff.

Given "the high public interest in uninterrupted health care," Alexandria, slip op. at 5, this is especially true in the health care industry. Recognizing the unique nature of health care even over fifty years ago, the House Committee specifically listed "nurses" as examples of the types of positions that must remain fully faithful to the interests of the employer and not the unions. H.R. Rep. No. 245, 80th Cong., 1st Sess. at 16. The Supreme Court echoed these concerns in its Health Care decision:

> Nursing home owners may want to implement policies to ensure that patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction. If so, the statute gives the nursing home owners the ability to insist on the undivided loyalty of its nurses.

511 U.S. at 580-81. Nurses with divided loyalties will be less effective monitors of unionized caregivers under their supervision. Any resulting decrease in oversight and discipline of health care workers would endanger the health and safety of the patients under their care.

II. THE CHARGE NURSES IN *BEVERLY* AND *OAKWOOD* EXERCISED INDEPENDENT JUDGMENT

An analysis of the relevant facts regarding the charge nurses in the health care cases identified in the July 25 Notice supports SLRMC's proposal that the Board implement a specialized test for the existence of independent judgment in the health care field and application of it to these cases easily warrants the conclusion that the employees in question

are statutory supervisors.

A. Relevant Facts and Holding of *Beverly*

The nursing home charge nurses in Beverly were directly involved in patient care, and gave directions to CNAs changing their patient, room and floor assignments; to perform particular patient care tasks; to leave early or stay late in modification of posted schedules; to work overtime; and to work a shift for which they were not scheduled. Beverly Enters.-Minn., Inc., Case 18-RC-16415, supp. dec. at 4 (Aug. 20, 2002) (Sharp, R.D.). The employer also authorized charge nurses to sign off on time clock revisions. Id. A charge nurse was the highest authority on-site nights and some weekends (even though they could call the director of nursing, assistant director of nursing or facility administrator with questions). Id. at 6.

Despite this evidence, RD Ronald Sharp concluded that "the judgments of the charge nurses are so circumscribed by existing policies, orders and regulations of the Employer that they do not exercise independent judgment within the meaning of Section 2(11)." Id. at 4. In reaching this conclusion, he noted his finding that for staffing purposes, the number of employees was "initially" determined by the schedule issued by the assistant director of nursing, with input based on a bidding procedure established by the CNAs' collective bargaining agreement, as well as the patient census. Id. at 5. He found that CNA replacements also were determined by a collectively-bargained procedure. Id. RD Sharp stated that he found "no evidence that charge nurses exercise independent judgment in releasing employees early from a scheduled shift or getting them to stay over" – rather, "the identity of affected employees is determined by volunteers or the collectively-bargained procedure." Id. Finally, he found "no evidence that the night and weekend charge RNs have any different duties or responsibilities than they have at other times." Id. at 6.

B. Relevant Facts and Holding of *Oakwood*

In Oakwood, the charge nurses at the employer's hospitals also exercised various direct patient care functions including overseeing the unit for the shift that they are working; monitoring all patients in that unit and noting unusual occurrences on "quality assessment reports"; and determining the acuity of patients and the level of skill required to care for the patient, and then assigning staff working on that shift based on these determinations. Oakwood Healthcare, Inc., Case 7-RC-22141, dec. at 11-15 (Feb. 4, 2002) (Glasser, R.D.).

Despite these functions and their authority, RD Stephen Glasser found that Oakwood's charge nurses did not exercise independent judgment. Specifically, he found that "[f]or every task performed by an RN, there is a very specific policy and procedure in writing." Id. at 19. Specifically, all charge nurses (as well as other employees) were governed by an employee handbook, id. at 4-6, 8-9, and nurses were subject to written procedures – including a chain of command, staffing and scheduling guidelines – approved by Oakwood's Acute Care Nursing Operations Council. Id. at 5, 7-8. Oakwood also had a policy for the assignment of nursing personnel to provide adequate staff to deliver care to patients. Id. at 13. RD Glasser also found that "the assignments are routine in nature," and that "the schedule is based on the schedule from the previous day, and providing continuity for the patients." Id. at 20. He also noted that "clinical supervisors, assistant clinical managers and/or clinical managers are present or on call 24 hours a day to handle any problems that might arise." Id.

> The Employer asserts that charge nurses exercise independent judgment when they assign staff nurses to particular patients or beds, by matching the level of experience of the employee with the level of acuity of the patient. However, the Employer has a very detailed written policy for the assignment of patients by charge nurses or assistant clinical managers. Pursuant to this policy, it is the responsibility of clinical managers or

> assistant clinical managers to ensure adequate staffing levels, and the composition of staff as to skill level when it comes to caring for the patients in a particular unit.

Id. Based on these findings, he concluded, "[t]he limited authority of RNs to assign discrete tasks to less skilled employees, based on doctor's orders, hospital policy and procedures or standing orders, or what is dictated by their profession, does not require the use of independent judgment in the direction of other employees." Id. at 19.

C. The Regional Directors' Decisions in *Beverly* and *Oakwood* Misapplied the Definition of Independent Judgment

In reaching their conclusions in Beverly and Oakwood, RDs Sharp and Glasser provided a concise summary of how the term "independent judgment" has been misinterpreted. Just as in Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2d Cir. 2000), they "conceded that the charge nurses may direct the work of [other employees], but concluded – seemingly more as a matter of rote than analysis – that this responsibility is routine in nature and does not require the existence of independent judgment." Id. at 266. SLRMC respectfully submits that, just as in that case, the RDs' findings – "really naked assertions – are unsustainable." Id.

1. The Assignment and Direction of Other Employees Based on the Charge Nurses' Assessment of Patient Acuity and Employee Skill Constitutes the Exercise of Independent Judgment

Both RD Sharp and RD Glasser appeared to agree that the charge nurses at issue had the power to assign and direct other health care employees in the provision of patient care. Despite those findings, they concluded that none of the decisions involved in patient care required independent judgment. This conclusion reflects a fundamental error: a health care professional's assignment and direction of other employees based on his or her assessment of patient acuity and the skill level of the other employees almost always involves an exercise

of independent judgment.

a. Patient Care Is Never "Routine"

Complex tasks involving patient care, even if performed over and over, do not become routine under § 2(11). As the Board stated in Sun, 301 N.L.R.B. at 649, "even if a particular operation is performed again and again, it does not necessarily follow that it is routine. . . . Constant monitoring and accountability is essential. Otherwise repetitive operations must be performed under constantly changing conditions which significantly vary the individual components of the operation and the order and the manner in which they are performed." This is especially true given the variable nature of patient health conditions.

For instance, in Schnurmacher, as in Beverly and Oakwood, the evidence showed that "an on-duty CN [charge nurse] is responsible to direct her staff in providing all necessary patient care including the filling of critical and changing medical needs, such as the administration of oxygen in emergency and even life-threatening situations." 214 F.3d at 268. The court concluded that such direction "in the provision of the latter type of care plainly requires the CNs to use independent judgment in assessing a patient's needs *and a finding to the contrary cannot survive under any standard of review.*" Id. (emphasis added). See also Beverly Health & Rehabilitation Servs., Inc. v. NLRB, Nos. 98-5160/98-5259, 1999 U.S. App. LEXIS 8395, at *11 (6th Cir. April 28, 1999) (noting that "these kinds of sensitive and nuanced judgments are hardly routine").

Other courts reached similar conclusions in factually analogous situations in the health care industry. In Glenmark, 147 F.3d at 341, for example, the court rejected the RD's decision that maintaining an appropriate staff level, including evaluating whether particular patients on a floor may require additional medical attention, did not require the exercise of

independent judgment.

> The authority to assign workers constitutes the power to put the other employees to work when and where needed. *Such decisions are, in our view, inseverable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an important impact on patient health and wellbeing.* An emergency decision regarding the appropriate staff level to accommodate ill patients requires a fact-specific individualized analysis of not only the patient's condition and the appropriate care, but also of the special skills of particular staff members.

Id. at 342 (emphasis added). In an environment such as an acute care hospital or nursing home, "[t]his power to authorize schedule changes and reassign workers rises above the mere incidental direction of assistants." Id. at 341.

b. There Is No Difference Between the Power or Authority to Act and the Exercise of Such Power or Authority.

In NLRB v. Attleboro Assocs., Ltd., 176 F.3d 154, 166 (3d Cir. 1999), the court concluded that "in determining that LPN [licensed practical nurse] charge nurses do not exercise independent judgment in setting daily assignments or directing the CNAs in their daily duties, the Regional Director erroneously applied the independent judgment criterion to the facts of this case." Just as in Beverly, the charge nurses in that case possessed the power to reorganize the schedule or request additional help in the case of an emergency. "This power, *by itself*, shows that an LPN charge nurse exercises her authority to assign and direct by using independent judgment." Id. at 167 (emphasis added). Since the charge nurses assigned and directed other employees "because they hold a superior rank to them and are entrusted by Attleboro to ensure the quality of care that residents receive," the court found that such duties "are supervisory functions, which require supervisory judgment, and indicate the epitome of supervisory authority." Id. at 169.

As is apparent from the language of these cases, the critical issue is whether in fact

the charge nurse actually has the *power* to make such decisions; the frequency of the exercise of such power is irrelevant. In Fuji Foods US, Inc., Case 27-CA-17596, 2002 NLRB LEXIS 313, at *14-*15 (July 29, 2002) (Patton, A.L.J.), for instance, the individual in question was a statutory supervisor and "[a] different conclusion is not warranted because supervision is only a part of her job or may not be frequently exercised. *Supervision is part and parcel of her job.*" (emphasis added). See also NLRB v. Prime Energy Ltd. Partnership, 224 F.3d 206, 210 (3d Cir. 2000) ("The mere fact that the regional director found only one instance where a Shift Supervisor sent a Plant Operator home is hardly a reasonable basis to conclude that the authority was lacking. It simply suggests that the authority was rarely needed."). An individual may be a supervisor even if he or she never exercised the power. See, e.g., Bay Harbour Elec., Inc., Case 6-CA-32166, 2002 NLRB LEXIS 577, at *110 (Nov. 25, 2002) (Evans, A.L.J.) ("Although Ockuly never disciplined employees, he was at least given the forms to warn them (the Employee Counseling Notes forms), and this is a strong suggestion that he had the authority to discipline employees within the meaning of Section 2(11).").

Likewise, in Beverly Enters., Va., Inc. v. NLRB, 165 F.3d 290, 298 (4th Cir. 1999), the court found that "the assignment of work, direction of nursing assistants, discipline of nursing assistants, and similar duties are not simply professional medical functions" but rather were "part and parcel of what it means to be a manager and a supervisor." Other cases have held that where "RNs devise direct care plans of action tailored to specific patients based on their own initial assessments of the patients," those nurses are supervisors. Hospice of Mich., dec. at 8. See also Beverly Cal. Corp. v. NLRB, 970 F.2d 1548, 1553 (6th Cir. 1992) ("It is perfectly obvious that the kind of judgment exercised by registered nurses in directing LPNs and nurse's aides in the care of patients occupying skilled and intermediate

care beds in a nursing home is not merely routine."); Brattleboro Retreat, Inc., Case 1-RC-21455, dec. at 11 (Feb. 20, 2002) (Pye, R.D.) (holding that the judgment involved in assigning work and directing other employees by taking into account the ability of the other employee "to work with a particular [patient], given the [patient's] age, gender and diagnosis, as well as the strengths and weaknesses of the [patient]" satisfied § 2(11)'s statutory test); M. Pavia Fernandez, Inc., Case No. 26-RC-8289, dec. at 11 (Oct. 6, 2001) (Small, Acting R.D.) (finding that nurses who made patient assignments and distributed tasks to non-professional employees such as LPNs and operating room technicians, "in what priority and what employee should perform each of the tasks," utilized independent judgment). "Furthermore, power to enforce important personnel policies, rules, and regulations is certain to require the exercise of independent judgment." Beverly Cal., 970 F.2d at 1553.

The holdings in these cases are not exceptional. Indeed, they are entirely consistent with the lower court's decision in Kentucky River Community Care, Inc. v. NLRB, 193 F.3d 444, 454 (6th Cir. 1999), aff'd, 532 U.S. 706 (2001).

> The registered nurses at KRCC direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments. These duties involve independent judgment which is not limited to, or inherent in, the professional training of nurses. *These duties are supervisory in nature.*

(emphasis added). A charge nurse's power to direct and assign other employees based on his or her assessment of the needs of a particular patient and the respective skill set of that particular employee therefore should be an integral part of any definition or test of "independent judgment," not just the exercise of such authority.

The explicit language of RD Glasser's Oakwood decision highlights the congenital

flaw in the Board's current treatment of health care supervisors. In his decision, he found that while the charge nurses directed other employees, such direction did not require the exercise of independent judgment because (1) the other employees were less skilled or (2) the assignments were based on what is dictated by the charge nurses' profession, or employer policies or procedures. Oakwood, dec. at 20. This "exclusion of some responsibilities as routine and of others as based on superior training and skills is a lethal combination allowing the [RD] to narrow the definition of supervisor to a vanishing point." Schnurmacher, 214 F.3d at 269. If the Board applied this aspect of RD Glasser's definition to every exercise of a supervisory function, "it would virtually eliminate 'supervisors' from the Act." Kentucky River, 532 U.S. at 715. The Board should reject RDs Sharp and Glasser's overly restrictive definition of the term "independent judgment."

2. The *Beverly* and *Oakwood* Decisions Found That Professional Judgment Was Mutually Exclusive of Supervisory Judgment in Violation of the Supreme Court's *Kentucky River* Decision

In Kentucky River, the Supreme Court explicitly rejected the Board's contention that "the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, independent judgment" as contradictory to both the text and structure of the statute. 532 U.S. at 721. By conceding that charge nurses assigned and directed employees with regard to critical patient care issues but still concluding that those decisions did not require independent judgment, RDs Sharp and Glasser failed to properly apply the Court's Kentucky River holding.

The implication and practical effect of Beverly and Oakwood is to rewrite the Act to make the terms "professional" and "supervisor" mutually exclusive. Such an error "fails to appreciate the distinction between using skill and professional judgment to perform a

complex job and using related skills and judgment to manage others." Glenmark, 147 F.3d at 340. See also Attleboro, 176 F.3d at 168 ("There is an obvious distinction between exercising independent judgment or acquired skill in completing a task, on the one hand, and using independent judgment in performing one of the 12 section 2(11) tasks, on the other."). To the extent that RDs Sharp and Glasser recognize that professionals like charge nurses "are by definition highly skilled employees whose jobs require the use of independent judgment," and who "routinely use their skills and exercise independent judgment in the performance of their own responsibilities," Glenmark, 147 F.3d at 340, they are correct. "In the case of nurses, they routinely make judgments regarding how appropriately to treat patients." Id.

But what the Beverly and Oakwood decisions overlook is the fact that there is "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." Id. "At the core of § 2(11) is the ability to exercise management prerogatives. The twelve statutorily enumerated tasks defining supervisory authority all represent management power over the future of an employee – be it in her initial hiring, day-to-day direction, or eventual firing." Id. "[W]hen an employer grants to an employee the authority to use judgment in the management or evaluation of other employees, that judgment is independent judgment under the NLRA, not the exercise of professional expertise." Beverly Enters., Va., 165 F.3d at 295. See also District No. 1, Marine Eng'rs Beneficial Ass'n, Case 20-RC-11282-1, 2003 NLRB LEXIS 36, at *23 (Jan. 27, 2003) (Wacknov, A.L.J.) ("Selecting people to do particular work is evidence of supervisory authority."). Thus, "where the responsibility to make such a judgment and to see that others do what is required by that judgment are lodged in one person, *that person is a quintessential statutory supervisor.*" Schnurmacher, 214 F.3d at 268 (emphasis added).

In the healthcare industry, where a patient's "critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely." Beverly Cal., 970 F.2d at 1553. "That the charge nurse in exercising this judgment may call on the experience and skill she has accumulated in her regular role as a nurse does not for a moment make the judgment she uses less than independent." Attleboro, 176 F.3d at 168. See also Evergreen, 65 Fed. Appx. at 626 ("That these decisions [at the charge nurses' direction and under their supervision] rely on the charge nurses' professional training and experience does not mean that it is not also an exercise of independent judgment.").

RDs Sharp and Glasser's limited definition of independent judgment is contrary to the language of the Act and applicable Supreme Court precedent. In rejecting this definition, the Board should state emphatically that the assignment and direction of employees by assessing their particular strengths and weaknesses and the peculiar facts and circumstances of the situation (e.g., the acuity of a patient in a hospital), even if based on training or experience, is consistent with the supervisory exercise of independent judgment.

III. THERE ARE A NUMBER OF FACTORS THAT, IF PRESENT, EASILY SATISFY THE SECOND PRONG OF SLRMC'S PROPOSED TEST

As stated earlier, SLRMC's proposed test for the health care industry requires charge nurses to (1) be directly involved in patient care and (2) have the power to direct or assign other employees in their provision of patient care based on his or her judgment as to the skill of the employee and patient acuity. Obviously, where the person at issue is a registered nurse, he or she is most likely directly involved in patient care. The test then moves to the

second requirement: can the employer prove that the putative supervisor has authority to make staffing assignments and otherwise direct others?

Based on the authority discussed above, there are a number of factors that, separately or cumulatively, would easily satisfy the second prong of SLRMC's proposed test and that, therefore, show the exercise of independent judgment under the Act:

- If a charge nurse assesses another employee's skills in conjunction with a patient's acuity and needs in making staffing assignments.
- If a charge nurse considers a nurse's workload to ensure that the nurse does not have a workload that would hinder his or her ability to provide skills to a particular patient.
- If a charge nurse has authority to adjust nurses' workloads so that a nurse with one or a few demanding patients will care for fewer total patients, or to ensure that a nurse with an aggravating condition is assigned to a nurse with the appropriate professional skills for that particular patient.
- If a charge nurse has latitude in the scheduling and staffing of nurses – and, in particular, the authority to call in off-duty RNs to meet a staffing shortage or, if the workload is light, the authority to send nurses home.
- If a charge nurse is involved in the personnel process – such as participation in interviewing, orientation, counseling and evaluation.

In addition to the other indicia discussed herein, the fact that charge nurses receive premium pay for their time spent in that capacity is another indicator of supervisory status. Furthermore, some sort of written statement from the hospital that the employer considers the charge nurse to be a supervisor – whether a job description or some other document – may be probative. Indeed, the fact that the employer expects a charge nurse to take on these functions further militates in favor of a finding of independent judgment. See Glenmark, 147 F.3d at 344 ("At Point Pleasant, the charge nurse's job description tells the charge nurse that she may be responsible for all staff in the entire facility.").

These cases reflect that being charge nurse "brings with it the responsibility of

handling day-to-day crises that might arise with staff or patients." Id. "The charge nurse is the employer's designated representative to whom the other employees will first turn in the case of any unusual happening or emergency. Being designated charge nurse is more significant than acquiring a mere title, it is acceding to full responsibility for the [floor or unit]." Id. See also Schnurmacher, 214 F.3d at 269 (noting that "according CNs a separate title, assigning one to each floor, and providing a job description including the power to discipline shows that SNH has given them a formal management role").

If these factors are present in an individual's job, that individual is exercising independent judgment through their supervisory instructions to others. In the health care industry, the successful completion of these instructions by other nurses, technical employees, aides, orderlies and clerical employees is essential to patient care. The nature of this decisionmaking is as varied and complex as the variable nature of a particular patient's medical condition. This emphasizes the distinction between the role of the charge nurse in health care and other supervisory employees: it is no exaggeration to note that charge nurses' decisions may involve matters of life or death. Based on SLRMC's proposed solution to the issue of whether a charge nurse is a supervisor under the Act, an individual possessing all or most of these characteristics is exercising independent judgment within the meaning of the NLRA and, therefore, qualifies as a statutory supervisor.

IV. FAILURE TO ADOPT A NEW STANDARD REGARDING HEALTH CARE WORKERS' EXERCISE OF INDEPENDENT JUDGMENT WILL SUBJECT THE BOARD TO CONTINUING LITIGATION OF THIS ISSUE

Unless the Board takes steps to adopt a new test of the term independent judgment, it will be forced to revisit this issue repeatedly in the coming months and years. For instance, the Sixth Circuit Court of Appeals has noted that with regard to the issue of supervisory

status of nurses, "the NLRB interpretation was not entitled to the normal deference given to agency interpretations of ambiguous provisions because the rule announced differed from the NLRB's actual application of this rule." Kentucky River, 193 F.3d at 454 (citing Mid-Am. Care Found'n v. NLRB, 148 F.3d 638, 642 (6th Cir. 1998)). That appellate court has indicated a willingness to overrule Board decisions that it feels are not consistent with the language of the Act or Supreme Court precedents. See Integrated Health Servs. of Mich., at Riverbend, Inc. v. NLRB, 191 F.3d 703, 712 (6th Cir. 1999) ("It is the responsibility of this Court to interpret the law as written by Congress and promulgated through case decisions. Although the Board has maintained it will not yield this point, when the facts so warrant, as in the case at bar, this court must reverse the decision of the Board.").[5]

Nor is the Sixth Circuit alone in this regard. In the last two Supreme Court cases involving the issue of supervisory status of nurses, the Court found the Board's position to be "inconsistent with the statute and our precedents," Health Care, 511 U.S. at 584, and "contradict[ing] both the text and structure of the statute." Kentucky River, 532 U.S. at 721. In addition to those cases discussed herein from the Second, Third, Fourth, Sixth and Ninth Circuits that appear to disagree with the Board's definition of independent judgment, at least three other circuits have remanded cases to the Board in the wake of the Supreme Court's Kentucky River decision. See, e.g., Public Serv. Co. v. NLRB, 271 F.3d 1213 (10th Cir. 2001); Beverly Enters.-Minn., Inc. v. NLRB, 266 F.3d 785 (8th Cir. 2001); Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203 (5th Cir. 2001). As a result, a determination of independent judgment that is not consistent with Supreme Court precedent or the language of

[5] Oakwood is located within the jurisdiction of the Sixth Circuit; i.e., Michigan.

the Act will force these courts of appeal to continue to overturn Board decisions in the future, leading to continuing conflicts among regional decisions in representation cases.

V. CONCLUSION

Based on the foregoing, SLRMC respectfully requests that the Board implement a new test applicable only to the health care industry that where the party asserting supervisory status produces evidence that (1) the putative supervisor is directly involved in patient care and (2) the putative supervisor has the power to direct or assign other employees in their provision of patient care based on his or her judgment as to the skill of the employee, the patient's acuity or other variables, that party is entitled to a rebuttable presumption that the individual in question is exercising independent judgment under the NLRA notwithstanding the fact that the employee(s) may be guided largely by the employers rules, regulations and policies. SLRMC submits that this new test is consistent with the statutory and Board preference for special treatment for health care institutions and should be adopted to resolve the Kentucky River issues in pending health care cases.

Respectfully submitted this 17th day of September, 2003.

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